

DECISION DOCUMENT  
NATIONWIDE PERMIT 3

This document discusses the factors considered by the Corps of Engineers (Corps) during the reauthorization process for this Nationwide Permit (NWP). This document contains: (1) the public interest review required by Corps regulations at 33 CFR 320.4(a)(1) and (2); (2) a discussion of the environmental considerations necessary to comply with the National Environmental Policy Act; and (3) the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230). This evaluation of the NWP includes a discussion of compliance with applicable laws, consideration of public comments, an alternatives analysis, and a general assessment of individual and cumulative impacts, including the general potential effects on each of the public interest factors specified at 33 CFR 320.4(a).

1. MAINTENANCE. Activities related to: (i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement, are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.  
  
(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank

stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in waters of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit does not authorize the replacement of lands lost through gradual erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration is not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21). (Sections 10 and 404)

Note: This NWP authorizes the minimal impact repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance.

General conditions of the NWPs are in the Federal Register notice announcing the reauthorization of this NWP. Notification requirements, additional conditions, limitations, and restrictions are in 33 CFR Part 330.

2. STATUTORY AUTHORITY:

- (a) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)
- (b) Section 404 of the Clean Water Act (33 U.S.C. 1344)

3. COMPLIANCE WITH RELATED LAWS (33 CFR 320.3):

(a) General:

NWPs are a type of general permit designed to authorize certain activities that have minimal adverse effects on the aquatic environment and generally comply with the related laws cited in 33 CFR 320.3. Activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, cannot be authorized by NWPs. Individual review of each activity authorized by an NWP will not normally be performed, except when preconstruction notification to the Corps is required or when an applicant requests verification that an activity complies with an NWP. Potential adverse impacts and compliance with the laws cited in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, regional and case-specific conditions, and the review process that is undertaken prior to the issuance or modification of NWPs.

The evaluation of this NWP, and related documentation, considers compliance with each of the following laws, where applicable: Sections 401, 402, and 404 of the Clean Water Act; Section 307(c) of the Coastal Zone Management Act of 1972, as amended; Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the National Environmental Policy Act of 1969; the Fish and Wildlife Act of 1956; the Migratory Marine Game-Fish Act; the Fish and Wildlife Coordination Act, the Federal Power Act of 1920, as amended; the National Historic Preservation Act of 1966; the Interstate Land Sales Full Disclosure Act; the Endangered Species Act; the Deepwater Port Act of 1974; the Marine Mammal Protection Act of 1972; Section 7(a) of the Wild and Scenic Rivers Act; the Ocean Thermal Energy Act of 1980; the National Fishing Enhancement Act of 1984; and the Magnuson-Stevens Fishery and Conservation and Management Act. In addition, compliance of the NWP with other Federal requirements, such as Executive Orders and Federal regulations addressing issues such as floodplains, essential fish habitat, and critical resource waters is considered.

(b) Terms and Conditions:

Many NWPs have notification requirements that trigger case-by-case review of certain activities. Two NWP general conditions require case-by-case review of all activities that may adversely affect Federally-listed endangered or threatened species or historic properties (i.e., General Conditions 11 and 12). General Condition 7 restricts the use of NWPs for activities that are located in Federally-designated wild and scenic rivers. None of the NWPs authorize

artificial reefs. General Condition 15 prohibits the use of an NWP with other NWPs, except when the acreage loss of waters of the United States does not exceed the highest specified acreage limit of the NWPs used to authorize the single and complete project.

In some cases, activities authorized by an NWP may require other Federal, state, or local authorizations. Examples of such cases include, but are not limited to: activities that are in marine sanctuaries or affect marine sanctuaries or marine mammals; the ownership, construction, location, and operation of ocean thermal conversion facilities or deep water ports beyond the territorial seas; activities that result in discharges of dredged or fill material into waters of the United States and require Section 401 water quality certification; or activities in a state operating under a coastal zone management program approved by the Secretary of Commerce under the Coastal Zone Management Act. In such cases, a provision of the NWPs states that an NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)(2)]

Additional safeguards include provisions that allow the Chief of Engineers, division engineers, and/or district engineers to: assert discretionary authority and require an individual permit for a specific activity; modify NWPs for specific activities by adding special conditions on a case-by-case basis; add conditions on a regional or nationwide basis to certain NWPs; or take action to suspend or revoke an NWP or NWP authorization for activities within a region or state. Regional conditions are imposed to protect important regional concerns and resources. [33 CFR 330.4(e) and 330.5]

(c) Review Process:

The analyses in this document and the coordination that was undertaken prior to the modification of the NWP fulfill the requirements of the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act, and other acts promulgated to protect the quality of the environment.

All NWPs that authorize activities which may result in discharges into waters of the United States require a Section 401 water quality certification. NWPs that authorize activities within, or affecting land or water uses within a state that has a Federally-approved coastal zone management program, must also be certified as consistent with the state's program. The procedures to ensure that the NWPs comply with these laws are described in 33 CFR 330.4(c) and (d), respectively.

(d) Public Comment and Response:

For a summary of the public comments received in response to the August 9, 2001, Federal Register notice, refer to the preamble in the Federal Register notice announcing the re-issuance

of this NWP. The substantive comments received in response to the August 9, 2001, Federal Register notice were used to improve the NWP by changing NWP terms and limits, notification requirements, and/or NWP general conditions, as necessary.

4. INDIVIDUAL AND CUMULATIVE IMPACTS:

(a) General Evaluation Criteria:

This document contains a general assessment of the foreseeable effects of the individual activities authorized by this NWP, the anticipated cumulative effects of those activities, and the potential future losses of waters of the United States that are estimated to occur until the expiration date of the NWP. In the assessment of these individual and cumulative effects, the terms and limits of the NWP, notification requirements, and the standard NWP general conditions are considered. The supplementary documentation provided by division engineers will address how regional conditions affect the individual and cumulative effects of the NWP.

The following evaluation comprises the NEPA analysis, the public interest review specified in 33 CFR 320.4(a)(1) and (2), and the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230).

The issuance or modification of an NWP is based on a general assessment of the effects on public interest and environmental factors that are likely to occur as a result of using this NWP to authorize activities in waters of the United States. As such, this assessment must be speculative or predictive in general terms. Since NWPs authorize activities across the nation, projects eligible for NWP authorization may be constructed in a wide variety of environmental settings. Therefore, it is difficult to predict all of the indirect impacts that may be associated with each activity authorized by an NWP. For example, the NWP that authorizes 25 cubic yard discharges of dredged or fill material into waters of the United States may be used to fulfill a variety of project purposes. Indication that a factor is not relevant to a particular NWP does not necessarily mean that the NWP would never have an effect on that factor, but that it is a factor not readily identified with the authorized activity. Factors may be relevant, but the adverse effects on the aquatic environment are negligible, such as the impacts of a boat ramp on water level fluctuations or flood hazards. Only the reasonably foreseeable direct or indirect effects are included in the environmental assessment of this NWP. Division and district engineers will impose, as necessary, additional conditions on the NWP authorization or exercise discretionary authority to address locally important factors or to ensure that the authorized activity results in no more than minimal individual and cumulative adverse effects on the aquatic environment. In any case, adverse effects will be controlled by the terms, conditions, and additional provisions of the NWP. For example, Section 7 consultation will be required for activities that may affect endangered species.

(b) NEPA Alternatives:

This evaluation includes an analysis of alternatives based on the requirements of NEPA, which requires a more expansive review than the Clean Water Act Section 404(b)(1) Guidelines. The alternatives discussed below are based on an analysis of the potential environmental impacts and impacts to the Corps, Federal and state resource agencies, general public, and prospective permittees. Since the consideration of off-site alternatives under Section 404(b)(1) does not apply to specific projects authorized by general permits, the alternatives analysis discussed below consists of a general NEPA alternatives analysis for the NWP.

(i) No Action Alternative (no Nationwide Permit):

The no action alternative would not achieve one of the goals of the Corps Nationwide Permit program, which is to reduce the regulatory burden on applicants for activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. The no action alternative would also reduce the Corps ability to pursue the current level of review for other activities that have greater adverse effects on the aquatic environment, including activities that require individual permits as a result of the Corps exercising its discretionary authority under the NWP program. The no action alternative would also reduce the Corps ability to conduct compliance actions.

If this NWP is not available, substantial additional resources would be required for the Corps to evaluate these minor activities through the individual permit process, and for the public and Federal and state resource agencies to review and comment on the large number of public notices for these activities. In a considerable majority of cases, when the Corps publishes public notices for proposed activities that result in minimal adverse effects on the aquatic environment, the Corps typically does not receive responses to these public notices from either the public or Federal and state resource agencies. Another important benefit of the NWP program that would not be achieved through the no action alternative is the incentive for project proponents to design their projects so that those activities meet the terms and conditions of an NWP. The Corps believes the NWPs have significantly reduced adverse effects to the aquatic environment because most applicants modify their projects to comply with the NWPs and avoid the delays and costs typically associated with the individual permit process.

In the absence of this NWP, Department of the Army (DA) authorization in the form of another general permit (i.e., regional or programmatic general permits, where available) or individual permits would be required. Corps district offices may develop regional general permits if an NWP is not available, but this is an impractical and inefficient method for activities with minimal individual or cumulative adverse effects on the aquatic environment that are conducted across the Nation. Not all districts would develop these regional general permits for a variety of reasons. The regulated public, especially those companies that conduct work in more than one

Corps district, would be adversely affected by the widespread use of regional general permits because of the greater potential for lack of consistency and predictability in the authorization of similar activities with minimal adverse effects on the aquatic environment. These companies would incur greater costs in their efforts to comply with different regional general permit requirements between Corps districts. Nevertheless, in some states Corps districts have issued programmatic general permits to take the place of this and other NWP. However, this approach only works in states with regulatory programs comparable to the Corps Regulatory Program.

(ii) National Modification Alternatives:

Since the Corps Nationwide Permit program began in 1977, the Corps has continuously strived to develop NWPs that authorize activities that result only in minimal adverse effects on the aquatic environment, individually or cumulatively. Every five years the Corps reevaluates the NWPs during the reissuance process, and may modify an NWP to address concerns for the aquatic environment. Utilizing collected data and institutional knowledge concerning activities authorized by the Corps regulatory program, the Corps constantly reevaluates the potential impacts of activities authorized by NWPs. The Corps also uses substantive public comments on proposed NWPs to assess the expected impacts. This NWP was developed to authorize maintenance activities that are not exempt under Section 404(f) of the Clean Water Act, including the removal of accumulated sediments in the vicinity of existing structures and activities in waters of the United States associated with the restoration of upland areas damaged by a storm or other discrete event, provided those activities have minimal adverse effects on the aquatic environment. The Corps has considered alternative limits and applicable waters for this NWP, as well as modifying or adding NWP general conditions, as discussed in the preamble of the Federal Register notice announcing the modification of this NWP.

Although we did not propose any change to this nationwide permit in the August 9, 2001 Federal Register notice, numerous comments were received, as follows:

One commenter suggested that 'terms' should be applied to maintenance of all flood protection works that the Corps built in partnership with the State, and that are now maintained by local entities or by ourselves. We presume that this comment refers to 'term limits' on the time that may elapse between maintenance events in flood protection projects. Although this idea may have merit in the context of the original project authorization, or with respect to maintenance agreements with local sponsors, we do not believe that such limits can or should be imposed through NWP 3. We do not intend this NWP to encourage or compel maintenance activities to be conducted more frequently than is necessary. However, the eligibility requirements of NWP 3(i) do encourage maintenance to be conducted before the structure or fill falls into such a state of disrepair that it can no longer be considered "serviceable."

Another commenter expressed the opinion that NWP3 addressed activities that are exempt from regulations under Section 404(f)1 of the Clean Water Act.

This is not correct. NWP 3 does not, in any way, extend Clean Water Act or River and Harbor Act jurisdiction to any area or activity that is not subject to these laws.

One commenter suggested that while bioengineered projects are less environmentally damaging than riprap and offer benefits to salmon, the presence of wood in some bank protection structures has the potential to interfere with treaty fishing access by preventing the use of nets in areas. Another commenter stated that Tribes should be informed of all requests for this NWP that involve in-water work and granted 30 days to provide comments. Since we are unable to determine where, and under what particular circumstances, interference with treaty fishing rights, or other tribal rights, may be attributable to the use of NWP 3, we will defer such determinations, and the determination of any relevant and necessary modification of this NWP to our Division and District offices.

One commenter suggested that riprap should not be allowed in any waterbody where habitat-forming processes are limited, as identified by a state or federal watershed analysis for salmon and/or their habitat, and where the riprap would interfere with these processes. This commenter also suggested that the placement of riprap should be the minimum necessary to protect the structure. We believe that NWP 3, as proposed, will limit the placement of riprap to the minimum necessary to provide adequate erosion protection. However, applicable law does not impose any restriction related to the habitat-forming processes mentioned by this commenter. In light of this, we believe that would be inappropriate to impose such a policy under any Corps permit process. Although the consideration of such concerns may be proper in the context of authorizations for new work, we do not agree that it should be a compelling consideration in the context of the kinds of maintenance activities that are eligible for authorization under this NWP.

One commenter suggested that the Corps prohibit the addition of new riprap or, at a minimum, require “Notification” if new riprap is proposed, and that the Corps prohibit the placement of riprap or any other bank stabilization material in any special aquatic site, including wetlands. Another commenter stated the permit should prohibit “removal of accumulated sediments” in special aquatic sites. We can not prohibit the removal of accumulated sediments from special aquatic sites in section 404-only waters since these activities are not regulated under the law. Beyond this, since this NWP only authorizes activities that restore an area to its previous condition, we do not believe it is appropriate to prohibit the maintenance of structures or fills simply because special aquatic site may have formed in areas that require such repair. Similarly, with respect to the discharge of riprap or other bank stabilization materials, we do not believe that restoration of banks or of stabilization projects, within the limits of NWP 3, should be precluded by the presence of a special aquatic site.

One commenter suggested that this NWP should not be issued for maintenance work on



culverts that fail to meet appropriate standards for the upstream and downstream passage of fish, or issued for culverts that do not allow for the downstream passage of substrate and wood. This commenter also suggested that if the proposed action is to remove the build-up of substrate at the upstream end of the culvert, or from the culvert itself, a condition of the permit should be that all substrate of spawning size and all wood of any size should be placed at the downstream end of the culvert. We do not believe there are any national standards that we can apply to NWP 3 to assure that an adequate passage for fish and substrate materials is provided in the maintenance situations that can be authorized under this NWP. However, we agree that, to the extent that actions to enhance such fish and substrate passage can be incorporated into individual NWP 3 authorizations, they should be included as Best Management Practices. Any redeposit of excavated spawning-size substrate may be authorized under NWP 18, subject to the limitations of that permit.

Several commenters indicated the Corps should withdraw section (iii) as the dredging and discharge allowed is double that authorized by NWPs 18 and 19 and, as such, will result in greater than minimal adverse effects. Several commenters also offered the opinion that restoring upland areas damaged by a storm, etc., has nothing to do with maintaining currently serviceable structures. Furthermore, some commenters suggested that it may be difficult to determine if the “damage” is due to a discrete event after a two-year period. Additionally, there is no acreage limit for this section and placement of “upland protection structures” will result in changes in the upstream and downstream hydromorphology of a stream. We do not agree that the mere fact that the amount of the dredging or discharge authorized under this NWP, as compared to the authorization of similar activities under other NWPs, in any way indicates that the effects are more than minimal. The question of whether or not the restoring upland areas has anything to do with maintaining currently serviceable structures is not relevant to the consideration of this NWP since no such relationship is required by the permit itself, or by the regulations governing the issuance of such permits. We do agree that, in some cases, it may be difficult to determine whether any damage is due to a discrete event. For this reason, the NWP prescribes only limited criteria in this regard, and it affords considerable discretion to the District Engineer to determine when there is a reasonable indication that the damage being repaired qualifies for authorization under NWP 3.

Two commenters indicated the permit can be used to expand the scope of other NWPs, including 13, 18, 19 and 31 which could result in more than minimal impact to the environment. We agree that NWPs can be, and sometimes are, misused, but we believe that the indications of such instances are relatively rare, particularly in comparison to the number of NWP authorizations granted. We rely on our District offices to provide reasonable final assurance that the use of one or more NWPs, as they are applied in actual situations, do not result in more than minimal impacts. Districts have discretionary authority to require individual permits in situations where there is reason to believe that any NWP, individually or in combination with other NWPs, will result in more than minimal impacts.

One commenter suggested that the permit (inappropriately) encourages reconstruction in floodplains without questioning the need or desirability of doing so. We believe that, inherent in the authorization of a structure or fill, and in effective authorization related to structures or fills that were installed prior to the need for a permit, is the reasonable right to maintain those structures or fills. With respect to the kinds of activities that are eligible for authorization under NWP 3, we do not agree that any assessment of need or desirability, other than the need or desire of the project proponent, is appropriate or necessary to ensure that the relevant effects are no more than minimal, including the effects on the floodplain.

Several commenters stated the lack of a definition of “discrete event” ignores the natural, hydrological processes at work in stream systems and allows landowners to prevent natural meandering processes within a waterway caused by normal storm events.

On the contrary, NWP 3 clearly recognizes that maintenance may be required either as a result of a discrete event such as a storm, or as a result of non-discrete forces. However, we do not agree that landowners should be prevented or unduly constrained from maintaining legitimately constructed structures or fills that are subject to the effects of natural hydrologic processes of adjoining waters.

A couple commenters stated that allowing riprap and gabions will result in the permanent channelization of natural streams by inhibiting their natural movement within the floodplain with major direct and secondary effects to the aquatic environment, as well as adverse hydrologic affects to downstream properties. Since NWP 3 only authorizes activities that return a project to previously existing conditions, we do not believe that it will result in any effects that did not previously accrue from the existence of the original structure or fill, and we believe that the maintenance activities authorized under this NWP will have no more than minimal adverse effects.

One commenter insisted that NWP3(i) should be modified to also allow for the maintenance of existing structures or fill that did not require a permit at the time they were discovered. NWP 31 does authorize regulated activities related to the repair, rehabilitation, or replacement of structures or fills that did not require authorization at the time they were constructed. As referenced in NWP3(i), the regulations at 33 CFR 330.3 provide an elaboration on this point.

One commenter suggested that NWP3(ii) should be modified to allow the Corps District Engineer to waive the 200’ limitation in any direction from the structure when the aquatic resource impacts would remain minimal. This commenter also suggested that the NWP should also specify that areas that are only excavated with only incidental fallback, temporary stockpile areas, and temporary redeposits should not be included in the 200’ limitation since such impacts would not cause a loss of waters of the U.S. It is entirely reasonable to conclude that regulated discharges associated with the removal of accumulated sediments that occur more than 200 feet

from a certain structure may have no more than minimal effects. However, our intent in qualifying such removal for eligibility under NWP was to authorize them as part of the maintenance of a specific structure, and not simply because the effects were minimal. Although we can not certify that 200 feet is, in any way, an absolute distance within which removals are clearly associated with the maintenance of the structure, we believe that it is a reasonable distance for asserting such association for the purposes of this NWP. Incidental fallback associated with otherwise unregulated activities is not regulated under section 404 of the Clean Water Act or under section 10 of the Rivers and Harbors Act. Temporary stockpiles and other temporary discharges of dredged or fill materials in waters of the U.S. are regulated, but we believe that they can and should be avoided in most maintenance situations. Although they may not result in a permanent or net loss of waters of the U.S., and they may have no more than minimal effects, we do not believe that they are necessary in most cases. Because we do not intend to encourage unnecessary work through the NWPs, we are not including such activities among those eligible for authorization under NWP 3

One commenter suggested that NWP3(iii) should be modified to allow the Corps District Engineer to waive the limitation which states that dredging may not be done primarily to obtain fill for restorative purposes when the aquatic resource impacts would remain minimal or when it is environmentally advantageous to allow some modification of pre-existing contours or discharges of additional fill material to prevent recurring damage and the associated repeated disturbance to continually repair the damage. This commenter further suggested that the District Engineer could then exercise more discretion in terms of requiring watershed based mitigation banks and in-lieu fee programs for additional impacts while requiring mitigation at a site of superior watershed importance.

Excavation is not regulated under the Clean Water Act, so dredging in these waters does not require a permit as long as there is no regulated discharge associated with the excavation. Excavation/dredging in waters that are subject to section 10 of the Rivers and Harbors Act is regulated under that law, but we are not convinced that allowing dredging to obtain fill would have no more than minimal impacts without a detailed listing of dredging limitations and conditions. In light of this, we do not agree that the suggested expansion of this NWP is appropriate. This NWP does allow some minor deviation, but modifications that are more than minor deviations can not be considered to be "maintenance" as it is envisioned in this NWP and, depending on the nature and location of such prospective changes, separate authorization may be required.

One commenter stated that individuals should not be able to use this Nationwide Permit to increase the area impacted by bank stabilization structures. NWP 3 does not authorize any significant increase in the original structure or fill. Only minor deviations that are necessary to effect repairs are eligible for authorization under this NWP.

One commenter insisted the notification requirement should be removed from NWP3(ii) and NWP3(iii) as these requirements create additional administrative burden with no increase in

environmental protection or added value to the process. For NWP3(iii), the commenter suggested that the requirement should be changed to a post-construction notification in order to expedite repairs necessary to public infrastructure. We believe that these PCN requirements, as proposed, are a prudent means of assuring that the proposed maintenance activities are limited to those eligible for authorization under this NWP. We recognize that the PCN requirement imposes an additional burden on the project proponent, but we do not believe that it is inequitable or, in most circumstances, significant. Emergency permit procedures are available to authorize such maintenance activities more quickly in emergency situations.

One commenter suggested that NWP3 should be withdrawn as it is too broad for projects to be considered “similar in nature”, or to be able to determine that the various projects, when considered individually or cumulatively, will result in minimal adverse environmental effects. The commenter also felt that its limitations are arbitrary and capricious and potentially could result in the exposure of highly toxic compounds. We believe that NWP 3, as proposed, describes activities that are sufficiently similar in nature for the purposes of the NWP Program. Since this NWP only authorizes activities needed to return a project to a previously existing condition that either was authorized or that was implemented prior to the need for authorization, we do not agree that the effects will be more than minimal.

One commenter stated the Corps is unlikely to obtain adequate information on whether or not a change in use is contemplated, what the practicable alternatives are, or what materials are used unless an Individual Permit is required. In light of this, the commenter suggested that NWP3 should be rewritten to prevent serious and widespread abuses. We acknowledge that under this NWP, and in all permit situations regardless of the form of the authorization, we rely on the applicant's information on the intended use and on other aspects of the regulated activity. Since this NWP only authorizes activities that would return a project to previously existing conditions, we believe that the likelihood of serious or widespread abuses is exceedingly low.

(iii) Regional Modification Alternatives:

An important aspect of the new and modified NWPs is the continuing emphasis on regional conditions to address differences in aquatic resource functions and values across the nation. All Corps divisions and districts are expected to add regional conditions to the new and modified NWPs to enhance protection of the aquatic environment and address local concerns. Division engineers can also revoke an NWP if the use of that NWP results in more than minimal adverse effects on the aquatic environment, especially in high value or unique wetlands and other waters.

Corps divisions and districts also monitor and analyze the cumulative adverse effects of the NWPs on a watershed basis, and if warranted, further restrict or prohibit the use of the NWPs to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment. To the maximum extent practicable, division and district

engineers will use regulatory databases and institutional knowledge about the typical adverse effects of activities authorized by NWPs, as well as substantive public comments, to assess the individual and cumulative adverse effects on the aquatic environment resulting from regulated activities. When conducting this assessment, division and district engineers can only consider those activities regulated by the Corps under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972. Adverse impacts resulting from activities outside of the Corps scope of analysis, such as the construction or expansion of upland developments, cannot be considered in the Corps analysis of cumulative adverse effects on the aquatic environment.

(iv) Case-specific On-site Alternatives:

Although the terms and conditions for this NWP have been established at the national level to authorize most activities that have minimal adverse effects on the aquatic environment, division and district engineers have the authority to impose case-specific special conditions on NWP authorizations to ensure that the authorized work will result in minimal adverse effects.

General Condition 19 requires that the permittee minimize and avoid impacts to waters of the United States on-site to the maximum extent practicable. Off-site alternatives cannot be considered for activities authorized by NWPs. During the evaluation of a preconstruction notification, the District Engineer may determine that additional avoidance and minimization is practicable. The District Engineer may also condition the NWP authorization to require compensatory mitigation to offset losses of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. As another example, the NWP authorization can be conditioned to prohibit the permittee from conducting the work during specific times of the year to protect spawning fish and shellfish. If the proposed work will result in more than minimal adverse effects on the aquatic environment, then the District Engineer will exercise discretionary authority and require an individual permit. Discretionary authority can be asserted where there are concerns for the aquatic environment, including high value aquatic habitats. The individual permit review process requires a project-specific alternatives analysis, including the consideration of off-site alternatives, and a public interest review.

(c) Impact Analysis

(i) General:

This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, as well as the removal of accumulated sediments in the vicinity of existing structures and activities in waters of the United States associated with the

restoration of upland areas damaged by storms or other discrete events. The repair, rehabilitation, or replacement of a structure or fill is limited to the original dimensions or configuration, except for minor deviations due to changes in materials, construction techniques, or current construction codes or safety standards. The removal of accumulated sediments in the vicinity of existing structures is limited to the minimum necessary, but cannot extend further than 200 feet from the structure. Any rip rap placed to protect the structure is limited to the minimum necessary. Activities in waters of the United States associated with the restoration of uplands damaged by a storm or other discrete event are limited to the minimum necessary to restore the damaged area to its pre-event contours, with a 50 cubic yard limit for dredging. This NWP authorizes activities in all waters of the United States.

Notification is not required for activities authorized by paragraph (i) of this NWP. Notification is required for all activities authorized by paragraphs (ii) and (iii) of the NWP. The notification requirements allow district engineers to review certain proposed activities on a case-by-case basis to ensure that the adverse effects of those activities on the aquatic environment are minimal. If the District Engineer determines that the adverse effects of a particular project are more than minimal after considering mitigation, then discretionary authority will be asserted and the applicant will be notified that another form of DA authorization, such as a regional general permit or individual permit, is required (see 33 CFR 330.4(e) and 330.5).

Additional conditions can be placed on proposed activities on a regional or case-by-case basis to ensure that the work has minimal adverse effects on the aquatic environment. Regional conditioning of this NWP will be used to account for differences in aquatic resource functions and values across the country, ensure that the NWP authorizes only those activities with minimal individual or cumulative adverse effects on the aquatic environment, and allow each Corps district to prioritize its workload based on where its efforts will best serve to protect the aquatic environment. Regional conditions can prohibit the use of any NWP in certain waters (e.g., high value waters or specific types of wetlands or waters), lower notification thresholds, or require notification for all work in certain watersheds or types of waters. Specific NWPs can also be revoked on a geographic or watershed basis where the adverse effects resulting from the use of those NWPs are more than minimal.

In high value waters, division and district engineers can: 1) prohibit the use of the NWP in those waters and require an individual permit or regional general permit; 2) decrease the limits for the NWP; 3) require notification for all activities in those waters; 4) add regional conditions to the NWP to ensure that the adverse environmental effects are minimal; or 5) for those activities that require notification, add special conditions to NWP authorizations, such as compensatory mitigation requirements, to ensure that the adverse effects on the aquatic environment are minimal. NWPs can authorize activities in high value waters as long as the individual and cumulative adverse effects on the aquatic environment are minimal.

The construction and use of fills for temporary access for construction may be authorized by NWP 33 or regional general permits issued by division or district engineers. The related work must meet the terms and conditions of the specified permit(s). If the discharge is dependent on portions of a larger project that require an individual permit, this NWP will not apply. [See 33 CFR 330.6(c) and (d)]

(ii) Public interest review factors (33 CFR 320.4(a)(1)):

For each of the 20 public interest review factors, the extent of the Corps consideration of expected impacts resulting from the use of this NWP is discussed, as well as the reasonably foreseeable cumulative adverse effects that are expected to occur. The Corps decision process involves consideration of the benefits and detriments that may result from the activities authorized by this NWP.

(a) Conservation: The activities authorized by this NWP will have negligible effects on the natural resource characteristics of the project area, because the NWP is limited to maintenance activities. The adverse effects of activities authorized by this NWP on conservation will be minor, since the NWP authorizes only those activities with minimal adverse effects on the aquatic environment and the Corps scope of analysis is usually limited to impacts to aquatic resources.

(b) Economics: The maintenance of existing, currently serviceable structures or fills will have positive impacts on the local economy. During construction, these activities will generate jobs and revenue for local contractors as well as revenue to building supply companies that sell construction materials. The restoration of uplands lost as a result of a storm or other discrete event will benefit the landowner, by replacing damaged property.

(c) Aesthetics: Maintenance activities will cause negligible changes to the visual character of the waters of the United States where the existing structures or fills are located. The placement of rip rap to protect the existing structure or restored upland will affect the visual character of the waterbody, but these effects are likely to be minor. The extent and perception of these changes will vary, depending on the extent of the maintenance work, the nature of the surrounding area, and the public uses of the area. Maintenance activities authorized by this NWP can also modify other aesthetic characteristics, such as air quality and noise levels.

(d) General environmental concerns: Activities authorized by this NWP will affect general environmental concerns, such as water, air, noise, and land pollution. The authorized work will also affect the physical, chemical, and biological characteristics of the environment. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor, since the NWP authorizes only maintenance activities. Adverse effects to the chemical composition of the aquatic environment will be controlled by General Condition 18, which states

that the material used for construction must be free from toxic pollutants in toxic amounts. General Condition 19 requires mitigation to minimize adverse effects to the aquatic environment through on-site avoidance and minimization. Compensatory mitigation may be required by district engineers to ensure that the adverse effects on the aquatic environment are minimal. It is important to note that the Corps scope of analysis is usually limited to impacts to aquatic resources. Specific environmental concerns are addressed in other sections of this document.

(e) Wetlands: Discharges of dredged or fill material into waters of the United States for maintenance activities may result in the loss of small amounts of wetlands. Repair, rehabilitation, and replacement activities may result in minor losses of wetlands because of minor deviations due to construction techniques or changes in materials. The removal of accumulated sediments in the vicinity of existing structures may result in losses of wetlands. Activities in waters of the United States associated with the restoration of uplands damaged by storms or other discrete events are unlikely to result in the loss of substantial wetlands because the authorized work is limited to restoration of pre-event conditions. Wetlands located in temporary access roads or staging areas may be impacted by the work, but these wetlands will be restored, unless the District Engineer authorizes another use for the area. In the restored area the plant community may be different, especially if the site was originally forested.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction of wetlands may alter natural drainage patterns. Wetlands reduce erosion by stabilizing the substrate. Wetlands also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

General Condition 19 requires on-site avoidance and minimization of impacts to waters of the United States, including wetlands. Compensatory mitigation may be required to offset losses of wetlands so that the net adverse effects on the aquatic environment are minimal. General Condition 25 requires notification for all activities authorized by this NWP, if the work is located in designated critical resource waters, including adjacent wetlands. Division engineers can regionally condition this NWP to restrict or prohibit its use in high value waters. District engineers will also exercise discretionary authority to require an individual permit if the wetlands to be filled are high value and the work will result in more than minimal adverse effects on the aquatic environment. District engineers can also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.



(f) Historic properties: General Condition 12 states that the NWP cannot authorize activities that affect historic properties listed, or eligible for listing in, the National Register of Historic Places, until the District Engineer has complied with 33 CFR Part 325, Appendix C. The provisions of Appendix C ensure that activities authorized by NWPs comply with the National Historic Preservation Act.

(g) Fish and wildlife values: This NWP authorizes activities in all waters of the United States, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may cause minor changes to the habitat characteristics of streams and wetlands, but adverse effects to fish and wildlife habitat will be negligible since this NWP only authorizes maintenance activities. Activities authorized by paragraph (ii) of this NWP may improve fish passage by authorizing the removal of accumulated sediments in the vicinity of existing structures that impede the movement of fish and other aquatic organisms. Wetland and riparian vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Fish and other motile animals will avoid the project site during construction. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, which can affect fish populations, but these changes will be minor. However, notification is required for all activities authorized by paragraphs (ii) and (iii) of this NWP, which provides the District Engineer with an opportunity to review certain activities, assess potential impacts on fish and wildlife values, and ensure that the authorized work results in no more than minimal adverse effects on the aquatic environment.

General Condition 4 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movement of indigenous aquatic species. Compliance with General Conditions 17 and 20 will ensure that the authorized work has minimal adverse effects on shellfish beds and spawning areas, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory waterfowl, due to the requirements of General Condition 23.

Pursuant to Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Management Act, the Corps entered into programmatic Essential Fish Habitat consultation with the NMFS. As discussed elsewhere in this document (i.e., Section 4(c)(ii)(g), Section 4(c)(iii)(h), and Section 4(c)(iii)(l)), the NWPs contain provisions that will ensure that impacts to Essential Fish Habitat are minimal, individually or cumulatively. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on Essential Fish Habitat.

(h) Flood hazards: The activities authorized by this NWP will have negligible adverse effects the flood-holding capacity of the 100-year floodplain, since the NWP is limited to maintenance activities. The removal of accumulated sediments in the vicinity of existing structures will reduce flood hazards by restoring the water-holding capacity of the waterbody and reducing hazards to human health, safety, and welfare.

(i) Floodplain values: Activities authorized by NWP 3 will have minor effects on the flood-holding capacity of the floodplain, as well as other floodplain values, since it is limited to maintenance activities.

(j) Land use: Activities authorized by this NWP will have no adverse effects on land use, because the maintenance of existing structures and fills will not change the existing land use. The removal of accumulated sediments in the vicinity of existing structures and the restoration of uplands damaged by storms will also maintain existing land uses.

(k) Navigation: Activities authorized by this NWP will have minor adverse effects on navigation, because these activities must comply with General Condition 1. This NWP authorizes the maintenance, repair, and rehabilitation of structures or fills that may be located in navigable waters. Since the NWP authorizes only minor deviations from the original dimensions or configuration, any adverse effects on navigation will be minimal. The removal of accumulated sediments from the vicinity of existing structures and activities associated with the restoration of upland areas will have no adverse effects on navigation.

(l) Shore erosion and accretion: The activities authorized by this NWP will have minimal adverse effects on shore erosion and accretion processes, since the NWP is limited to maintenance activities. Repair of bank stabilization activities may be authorized by this NWP, provided the structure or fill is currently serviceable. The removal of accumulated sediments in the vicinity of existing structures will have negligible adverse effects on shore erosion and accretion. Bank stabilization measures may be incorporated into the upland restoration activity to protect the bank, which would affect shore erosion and accretion processes, but these effects will be minor.

(m) Recreation: Activities authorized by this NWP will not affect the recreational uses of the area, since it is limited to maintenance activities.

(n) Water supply and conservation: Activities authorized by this NWP will have negligible effects on surface water and groundwater supplies because this NWP authorizes only maintenance activities.

(o) Water quality: Maintenance activities in wetlands and waterbodies will have minor adverse effects on water quality. During maintenance activities, small amounts of oil and grease from

construction equipment may be discharged into the waterway. Because most of these maintenance activities will occur during a relatively short time period, the frequency and concentration of these discharges are not expected to have more than minimal adverse effects on water quality. The removal of accumulated sediments in the vicinity of existing structures and activities in waters of the United States associated with the restoration of uplands damaged by a storm or other discrete event may result in temporary increases in turbidity. If the proposed work involves a discharge into waters of the United States, Section 401 water quality certification will be required. The water quality certification will ensure that the authorized work does not violate applicable water quality standards. The restoration of areas damaged by storms or other discrete events will result in net improvement of water quality if the bank is stabilized.

(p) Energy needs: The activities authorized by this NWP will not permanently increase energy consumption in the area, because it is limited to maintenance activities.

(q) Safety: The activities authorized by this NWP will be subject to Federal, state, and local safety laws and regulations. Therefore, this NWP will not adversely affect the safety of the project area.

(r) Food and fiber production: Activities authorized by this NWP will have no adverse effects on food and fiber production, since the NWP is limited to maintenance activities. Paragraph (iii) of this NWP may be used to authorize activities in waters of the United States associated with the restoration of upland farmland lost as a result of a storm or other discrete event, which will help maintain agricultural production.

(s) Mineral needs: Activities authorized by this NWP may increase demand for aggregates and stone, which are used to repair structures or fills. Maintenance activities authorized by this NWP may utilize other building materials, such as steel, aluminum, and copper, which are made from mineral ores.

(t) Considerations of property ownership: The NWP complies with 33 CFR 320.4(g), which states that an inherent aspect of property ownership is a right to reasonable private use. The NWP provides expedited DA authorization for maintenance activities in waters of the United States that result in minimal adverse effects on the aquatic environment.

(iii) 404(b)(1) Guidelines Impact Analysis (Subparts C through F):

(a) Substrate: Discharges of dredged or fill material into waters of the United States for maintenance activities may alter the substrate of those waters, either by replacing the aquatic area with dry land or changing the physical, chemical, and biological characteristics of the substrate. The original substrate may be removed or covered by other material, such as

concrete, asphalt, soil, gravel, etc. Temporary fills may be placed upon the substrate, but must be removed upon completion of the work (see General Condition 24). Adverse effects to substrate will be negligible since the NWP authorizes only maintenance activities.

(b) Suspended particulates/turbidity: Depending on the method of construction, soil erosion and sediment control measures, equipment, composition of the bottom substrate, and wind and current conditions during construction, fill material placed in open waters will temporarily increase water turbidity. Particulates will be resuspended in the water column during removal of temporary fills. The turbidity plume will normally be limited to the immediate vicinity of the disturbance and should dissipate shortly after each phase of the construction activity. General Condition 3 requires the permittee to stabilize exposed soils and other fills, which will reduce turbidity. In many localities, sediment and erosion control plans are required to minimize the entry of soil into the aquatic environment. NWP activities cannot create turbidity plumes that smother important spawning areas downstream (see General Condition 20). The activities authorized by this NWP will have minor adverse effects on suspended particulates and turbidity.

(c) Water: Maintenance activities may result in temporary adverse effects on some characteristics of water, such as water clarity, chemical content, dissolved gas concentrations, pH, and temperature. These activities can change the chemical and physical characteristics of the waterbody by introducing suspended or dissolved chemical compounds or sediments into the water. Changes in water quality can affect the species and quantities of organisms inhabiting the aquatic area. Maintenance activities resulting in discharges of dredged or fill material into waters of the United States require water quality certification, which will ensure that the work does not violate applicable water quality standards.

(d) Current patterns and water circulation: Activities authorized by this NWP will have little adverse effect on the movement of water in the aquatic environment, since this NWP authorizes only maintenance activities. General Condition 21 requires the permittee to design the authorized activity to withstand expected high flows and maintain preconstruction surface flow rates from the site to the maximum extent practicable.

(e) Normal water level fluctuations: The activities authorized by this NWP will not adversely affect normal patterns of water level fluctuations due to tides and flooding, since the NWP is limited to maintenance activities.

(f) Salinity gradients: The activities authorized by this NWP will have minimal adverse effects on salinity gradients, since the NWP is limited to maintenance activities.

(g) Threatened and endangered species: The Corps believes that the procedures currently in place result in proper coordination under Section 7 of the Endangered Species Act (ESA) and ensure that activities authorized by this NWP will not jeopardize the continued existence or any

listed threatened and endangered species or result in the destruction or adverse modification of critical habitat. The Corps also believes that current local procedures in Corps districts are effective in ensuring compliance with ESA.

Each activity authorized by an NWP is subject to General Condition 11, which states that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to modify the critical habitat of such species." In addition, General Condition 11 explicitly states that the NWP does not authorize the taking of threatened or endangered species, which will ensure that permittees do not mistake the NWP authorization as a Federal authorization to take threatened or endangered species. General Condition 11 also requires the applicant to notify the District Engineer if there are endangered or threatened species in the vicinity of the project.

Under the current Corps regulations (33 CFR 325.2(b)(5)), the District Engineer must review all permit applications for potential impacts on threatened and endangered species or critical habitat. For the NWP program, this review occurs when the District Engineer evaluates the preconstruction notification or request for verification. Based on the evaluation of all available information, the District Engineer will initiate consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), as appropriate, if he or she determines that the regulated activity may affect any threatened and endangered species or critical habitat. Consultation may occur during the NWP authorization process or the district engineer may exercise discretionary authority to require an individual permit for the proposed activity and initiate consultation through the individual permit process. If ESA consultation is conducted during the NWP authorization process without the District Engineer exercising discretionary authority, then the applicant will be notified that he or she cannot proceed with the proposed activity until ESA consultation is complete. If the District Engineer determines that the activity will have no effect on any threatened and endangered species or critical habitat, then the District Engineer will notify the applicant that he or she may proceed under the NWP authorization.

Corps districts have, in most cases, established informal or formal procedures with local offices of the FWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps district engineers determine if a proposed activity will affect endangered species or their critical habitat and, if necessary, initiate consultation. Corps districts may utilize maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Regional conditions are added to NWPs, where necessary, to require notification for activities that occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the notification process, the FWS and NMFS will review the proposed work for potential impacts to threatened and endangered species and their critical habitat. Any information provided by local maps and databases and any comments received

during the notification process will be used by the district engineer to make a "may affect" or "not likely to adversely affect" decision. General Condition 25 requires notification to the District Engineer for all discharges into waters of the United States in designated critical habitat of Federally-listed threatened or endangered species, which will allow the District Engineer to review the proposed activity and determine if it complies with General Condition 11.

Based on the safeguards discussed above, especially General Condition 11, the Corps has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. Although the Corps continues to believe that these procedures ensure compliance with ESA, the Corps has taken some steps to provide further assurance. Corps district offices have met with local representatives of the FWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with ESA. Through formal consultation under Section 7 of the Endangered Species Act, or through other coordination with the FWS and/or the NMFS, as appropriate, the Corps will establish procedures to ensure that the NWP will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures will be included as regional conditions to the NWPs or as special conditions of an NWP authorization, if necessary.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web:

Since this NWP authorizes only maintenance activities, there will be only minor adverse effects to fish and other aquatic organisms in the food web. Fish and other motile animals will avoid the project site during construction. Sessile or slow-moving animals in the path of discharges, equipment, and building materials will be destroyed. Some aquatic animals may be smothered by the placement of fill material. Motile animals will return to those areas that are temporarily impacted by the work and restored or allowed to revert back to preconstruction conditions. Aquatic animals will not return to sites of permanent fills. Benthic and sessile animals are expected to recolonize sites temporarily impacted by the work, after those areas are restored. The removal of accumulated sediments in the vicinity of existing structures may improve the movement of aquatic organisms through the structure.

Division and district engineers can place conditions on this NWP to prohibit discharges during important stages of the life cycles of certain aquatic organisms. Such time of year restrictions can prevent adverse effects to these aquatic organisms during reproduction and development periods. General Conditions 17 and 20 address protection of shellfish beds and spawning areas, respectively. General Condition 17 prohibits activities in areas of concentrated shellfish populations. General Condition 20 states that activities in spawning areas during spawning

seasons must be avoided to the maximum extent practicable. In addition, General Condition 20 also prohibits activities that result in the physical destruction of important spawning areas. General Condition 21 requires the maintenance of preconstruction downstream flow conditions to the maximum extent practicable, which will help minimize adverse impacts to fish, shellfish, and other aquatic organisms in the food web.

(i) Other wildlife: Activities authorized by this NWP will result in adverse effects on other wildlife associated with aquatic ecosystems, such as resident and transient mammals, birds, reptiles, and amphibians, through the destruction of aquatic habitat, including breeding and nesting areas, escape cover, travel corridors, and preferred food sources. These adverse effects will be negligible because the NWP authorizes only maintenance activities. This NWP does not authorize activities that jeopardize the continued existence of Federally-listed endangered and threatened species or result in the destruction or adverse modification of critical habitat. General Condition 23 states that activities in breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. In accordance with General Condition 25, notification is required for activities authorized by this NWP in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, coral reefs, state natural heritage sites, and outstanding national resource waters officially designated by the state where those waters are located. For those sanctuaries and refuges not listed above, division engineers can regionally condition the NWP to restrict or prohibit its use in those areas. District engineers will also exercise discretionary authority and require individual permits for specific projects in waters of the United States in sanctuaries and refuges if those activities will result in more than minimal adverse effects on the aquatic environment.

(2) Wetlands: The activities authorized by this NWP will have minimal adverse effects on wetlands since the NWP authorizes only maintenance activities. District engineers will review preconstruction notifications for activities authorized by paragraphs (ii) and (iii) of the NWP, to ensure that the proposed work will result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to restrict or prohibit its use in certain high value wetlands. See paragraph (e) in Section 4(c)(ii), above, for a more detailed discussion of impacts to wetlands.

(3) Mud flats: The activities authorized by this NWP may affect mud flats, since some

maintenance activities may involve discharges of dredged or fill material into these areas. However, these adverse effects will be minor since maintenance activities typically affect small areas.

(4) Vegetated shallows: The activities authorized by this NWP may affect vegetated shallows, but the adverse effects will be negligible since the NWP authorizes only maintenance activities. The removal of accumulated sediments in the vicinity of existing structures may affect vegetated shallows, but these activities require notification to the District Engineer. Through the notification process, the District Engineer will determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. If the adverse effects are more than minimal, the District Engineer will exercise discretionary authority to require the project proponent to obtain an individual permit.

(5) Coral reefs: The activities authorized by this NWP will have minimal adverse effects on coral reefs, since the NWP authorizes only maintenance activities. General Condition 25 requires notification to the District Engineer for discharges of dredged or fill material in coral reefs, which will allow case-by-case review of these activities to ensure that they will result in minimal adverse effects on the aquatic environment.

(6) Riffle and pool complexes: Maintenance activities in riffle and pool complexes may be authorized by this NWP, but district engineers will review all proposed activities authorized by paragraphs (ii) and (iii) of this NWP to determine if those activities will result in minimal adverse effects on the aquatic environment. If the riffle and pool complexes are high value and the proposed work will result in more than minimal adverse effects on the aquatic environment, the District Engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. The repair, rehabilitation, or replacement of existing, currently serviceable structures or fills will have negligible adverse effects on riffle and pool complexes.

(k) Municipal and private water supplies: See paragraph (n) in Section 4(c)(ii), above, for a discussion of potential impacts to water supplies.

(l) Recreational and commercial fisheries, including Essential Fish Habitat: The activities authorized by this NWP will have minor adverse effects on waters of the United States that act as habitat for populations of economically important fish and shellfish species. All discharges into waters of the United States authorized by paragraphs (ii) and (iii) of this NWP require notification to the District Engineer, which will allow review of each activity to ensure that adverse effects to economically important fish and shellfish are minimal. Division and district engineers can condition this NWP to prohibit discharges during important life cycle stages, such as spawning or development periods, of economically valuable fish and shellfish. Compliance



with General Conditions 17 and 20 will ensure that the authorized work does not adversely affect concentrated shellfish populations or important spawning areas.

Pursuant to Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Management Act, the Corps entered into programmatic Essential Fish Habitat consultation with the NMFS. As discussed elsewhere in this document (i.e., Section 4(c)(ii)(g), Section 4(c)(iii)(h), and Section 4(c)(iii)(l)), the NWP contains provisions that will ensure that impacts to Essential Fish Habitat are minimal, individually or cumulatively. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on Essential Fish Habitat.

(m) Water-related recreation: See paragraph (m) in Section 4(c)(ii) above.

(n) Aesthetics: See paragraph (c) in Section 4(c)(ii), above.

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: General Condition 25 requires notification to the District Engineer prior to the use of this NWP in designated critical resource waters and adjacent wetlands, which may be located in parks, national and historical monuments, national seashores, wilderness areas, and research sites. This NWP can be used to authorize activities in parks, national and historical monuments, national seashores, wilderness areas, and research sites if the manager or caretaker wants to conduct work in waters of the United States and those activities result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition the NWP to prohibit its use in designated areas, such as national wildlife refuges or wilderness areas.

(iv) Cumulative Impacts:

The cumulative impacts of an NWP generally do not depend on the number of times the permit is used on a national basis but on the number of times the NWP and other DA permits are used within a specific geographic area, particularly a watershed. In a specific watershed, division or district engineers may determine that the cumulative adverse effects of the activities authorized by NWPs are more than minimal. Division and district engineers will monitor and review geographic areas that may be subject to more than minimal cumulative adverse effects. Division and district engineers have the authority to require individual permits where the cumulative adverse effects are more than minimal, or add conditions to the NWP either on a case-by-case or regional basis to ensure that the cumulative adverse effects are minimal. When division or district engineers determine that a geographic area is subject to more than minimal cumulative adverse effects due to the use of the NWPs, they will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, they will compile information on the cumulative adverse effects and supplement this document.

Based on data from past use of NWP 3 for these types of activities, the Corps estimated that this NWP would be used to authorize approximately 5,000 maintenance activities per year on a national basis. Of those activities, approximately 1,000 maintenance activities will have wetland impacts of approximately 300 acres with the Corps requiring approximately 400 acres of compensatory wetland mitigation. The demand for these types of activities could increase or decrease over the five-year duration of this NWP. Using the current trend, approximately 25,000 NWP 3 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 1,500 acres of waters of the United States with approximately 2,000 acres of compensatory mitigation required to offset those impacts. The Corps expects that the convenience and time savings associated with the use of this NWP will encourage applicants to design their projects within the scope of the NWP rather than request individual permits for projects which could result in greater adverse impacts to the aquatic environment.

(d) Additional Public Interest Review Factors (33 CFR 320.4(a)(2)):

(i) Relative extent of the public and private need for the proposed structure or work:

This NWP authorizes discharges of dredged or fill material into all waters of the United States for maintenance activities, including the removal of accumulated sediments in the vicinity of existing structures and activities in waters of the United States associated with the restoration of upland areas damaged by storms or other discrete events that have minimal adverse effects on the aquatic environment, individually and cumulatively. These activities satisfy public and private needs, such as the maintenance of existing structures and fills and safety considerations. The need for this NWP is based upon the large number of these inevitable maintenance activities that occur annually, with minimal adverse effects on the aquatic environment.

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work:

Most situations in which there are unresolved conflicts concerning resource use arise when environmentally sensitive areas are involved (e.g., special aquatic sites, including wetlands) or where there are competing uses of a resource. The nature and scope of the activity, when planned and constructed in accordance with the terms and conditions of this NWP, reduce the likelihood of such conflict. In the event that there is a conflict, the NWP contains provisions that are capable of resolving the matter (see Sections 1 and 3 of this document).

General Condition 19 requires the permittee to avoid and minimize discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site.

Consideration of off-site alternative locations is not required for activities that are authorized by general permits. General permits authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment and overall public interest. District engineers will exercise discretionary authority and require an individual permit if the proposed work will result in more than minimal adverse environmental effects on the project site. The consideration of off-site alternatives can be required during the individual permit process.

- (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited:

The nature and scope of the work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the maintenance activity. Activities authorized by this NWP will have minimal adverse effects on the aquatic environment.

As previously stated, the terms, conditions, and provisions of the NWP were developed to ensure that individual and cumulative adverse environmental effects are minimal. Specifically, NWPs do not obviate the need for the permittee to obtain other Federal, state, or local authorizations required by law. The NWPs do not grant any property rights or exclusive privileges (see Section 3 of this document and 33 CFR 330.4(b) for further information). Additional conditions, limitations, restrictions, and provisions for discretionary authority, as well as the ability to add activity-specific or regional conditions to this NWP, will provide further safeguards to the aquatic environment and the overall public interest. There are also provisions to allow suspension, modification, or revocation of the NWP. Refer to Sections 1 and 3 of this document for further information and procedures.

## 5. EVALUATION OF COMPLIANCE WITH THE GUIDELINES PROMULGATED UNDER SECTION 404(b)(1) OF THE CLEAN WATER ACT (40 CFR Part 230):

The 404(b)(1) compliance criteria for general permits are contained in 40 CFR 230.7.

- (a) Evaluation Process (40 CFR 230.7(b)(1)):

- (i) Alternatives (40 CFR 230.10(a)):

General Condition 19 requires the permittee to avoid and minimize discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site. The consideration of off-site alternatives is not directly applicable to general permits.

- (ii) Prohibitions (40 CFR 230.10(b)):

This NWP authorizes discharges of dredged or fill material into waters of the United States, which require Section 401 water quality certification. Water quality certification requirements will be met in accordance with the procedures in 33 CFR 330.4(c).

No toxic discharges will be authorized by this NWP. General Condition 18 specifically states that the material must be free from toxic pollutants in toxic amounts.

This NWP does not authorize activities that jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of critical habitat. Reviews of preconstruction notifications, regional conditions, and local operating procedures for endangered species will ensure compliance with the Endangered Species Act. Refer to General Condition 11 and to 33 CFR 330.4(f) for information and procedures.

This NWP will not authorize the violation of any requirement to protect any marine sanctuary. Refer to Section 3 of this document for further information.

(iii) Findings of Significant Degradation (40 CFR 230.10(c)):

Potential impact analysis (Subparts C through F):

The potential impact analysis specified in Subparts C through F is discussed in Section 4 of this document. Mitigation required by the District Engineer will ensure that the adverse effects on the aquatic environment are minimal.

Evaluation and testing (Subpart G):

Because the terms and conditions of the NWP specify the types of discharges that are authorized, as well as those that are prohibited, individual evaluation and testing for the presence of contaminants will normally not be required. If a situation warrants, provisions of the NWP allow division or district engineers to further specify authorized or prohibited discharges and/or require testing.

Based upon Subparts B and G, after consideration of Subparts C through F, the discharges authorized by this NWP will not cause or contribute to significant degradation of waters of the United States.

(iv) Factual determinations (40 CFR 230.11):

The factual determinations required in 40 CFR 230.11 are discussed in Section 4 of this document.

(v) Appropriate and practicable steps to minimize potential adverse impacts (40 CFR 230.10(d)):

As demonstrated by the information in this document, as well as the terms, conditions, and provisions of this NWP, actions to minimize adverse effects (Subpart H) have been thoroughly considered and incorporated into the NWP. General Condition 19 requires the permittee to avoid and minimize activities in waters of the United States to the maximum extent practicable on the project site. Compensatory mitigation required by the District Engineer will ensure that the net adverse effects on the aquatic environment are minimal.

(b) Evaluation Process (40 CFR 230.7(b)(2)):

(i) Description of permitted activities:

As indicated by the text of this NWP in Section 1 of this document and the discussion of potential impacts in Section 4, the activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization under a single general permit. Specifically, the purpose of the NWP is to authorize maintenance activities, including the removal of accumulated sediment in the vicinity of existing structures and activities in waters of the United States associated with the restoration of upland areas damaged by storms or other discrete events. The nature and scope of the impacts are controlled by the terms and conditions of the NWP.

If a situation arises in which the activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

(c) Cumulative effects (40 CFR 230.7(b)(3)):

The cumulative effects, including the number of activities likely to be authorized under this NWP, are discussed in Section 4 of this document. If a situation arises in which the proposed activity requires further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

6. Final Determinations:

(a) Finding of No Significant Impact:

Based on the information in this document, the Corps has determined that the issuance of this NWP will not have a significant impact on the quality of the human environment. Therefore, the preparation of an Environmental Impact Statement is not required.

(b) 404(b)(1) Compliance:

This NWP has been evaluated for compliance with the Section 404(b)(1) Guidelines, including Subparts C through G. Based on the information in this document, the Corps has determined that the discharges authorized by this NWP comply with the 404(b)(1) Guidelines, with the inclusion of appropriate and practicable conditions, including mitigation, necessary to minimize adverse effects on affected aquatic ecosystems. The activities authorized by this NWP will not result in significant degradation of the aquatic environment.

(c) Public Interest Determination:

In accordance with the requirements of 33 CFR 320.4, the Corps has determined, based on the information in this document, that the issuance of this NWP is not contrary to the public interest.

(d) Section 176(c) of the Clean Air Act General Conformity Rule Review:

This NWP has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities authorized by this permit will not exceed de minimis levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons, a conformity determination is not required for this NWP.

(e) Public Hearing: A public hearing was held on September 26, 2001, in Washington, D.C. to solicit comments on the proposed modification of this NWP.

FOR THE COMMANDER

Date: 04 JAN 2002

/s/

ROBERT H. GRIFFIN  
Brigadier General, U.S. Army  
Director of Civil Works